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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of LISA and  
FARAMARZ NADERZAD.

H045298  
(Santa Clara County  
Super. Ct. No. 2014-6-FL-011980)

LISA GAIL NADERZAD,

Respondent,

v.

FARAMARZ FRANK NADERZAD,

Appellant.

Appellant Faramarz “Frank” Naderzad (Husband) and Respondent Lisa Naderzad (Wife) were married over 30 years. During the marriage, Husband started a business known as ATM’s United<sup>1</sup>, in which he purchased automated teller machines (ATM) and installed them in strategic locations; Husband maintained and serviced the machines as well. After Wife filed for dissolution, the parties entered into a stipulation under which Husband could attempt to sell the business, or, if he was unable to do so, liquidate the assets and cease operation of the business; Husband elected the latter. Wife thereafter requested a bifurcated trial seeking an alternate date of valuation for the business,

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<sup>1</sup> The parties and court do not refer to the business’s name with consistency, calling it ATM’s United, ATMs United, and ATM United. The parties listed the name as ATM’s United on the profit and loss statements filed with their tax returns, as did the trial court in the order at issue in this appeal. Thus, we will refer to the business as ATM’s United.

pursuant to Family Code<sup>2</sup> section 2552, subdivision (b). Husband now appeals the trial court's order granting Wife's motion and setting the date of separation as the valuation date, rather than the date of trial. Finding the court did not abuse its discretion in doing so, we affirm the order.

## **I. FACTUAL AND PROCEDURAL HISTORY**

In 2017, the trial court received evidence in a bench trial regarding Wife's motion for an alternate date of valuation for ATM's United.<sup>3</sup> Based on that evidence, the court issued an order in October 2017, granting Wife's motion and setting the valuation date as February 28, 2014. The court heard testimony from Husband and Wife, as well as from certified public accountants (CPA) Marianne Kring and Lucy Chung. We glean the following from the record created during the trial through the testimony, evidence, and pleadings.

### ***A. ATM's United Prior to Separation***

The parties married in June 1983, and separated in February 2014, after over 30 years of marriage. During the marriage, Husband purchased an ATM machine, located at the gas station where he worked. Based on the \$200-300 per month profit from the machine, Husband proposed to Wife that they go into the ATM business; Wife agreed, and the parties started ATM's United, acquiring additional ATMs. A friend of Husband's helped him get the company started, connecting him with businesses desiring to have an ATM installed on their premises. He also purchased at least one preexisting "route," consisting of a series of ATMs already installed in businesses. Aside from this route, most of the ATMs Husband installed were done with "handshake" agreements, rather than a written contract.

Husband contends both he and Wife "worked extensively in the business" during the marriage, although they reported ATM's United as a sole proprietorship in Husband's

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<sup>2</sup> All future unspecified statutory references are to the Family Code.

<sup>3</sup> The parties stipulated that their case be decided by a private judge.

name “for ease of tax reporting.” Throughout ATM’s United’s existence, Husband was working full-time as a manager of a service station; he alleges he could not have run the business by himself without Wife’s assistance. Husband testified Wife scouted possible locations to install ATMs, including driving to locations and passing out flyers to business owners. She created business cards. She assisted in installing and maintaining the machines as well, including filling the machines and unclogging money from the dispensers of the ATMs.

Wife alleges Husband ran the business by himself, except for limited periods after the parties’ separation when their son worked for Husband; Wife did not consider herself an owner of the business. She made one flyer and created a business card in the early stages of the business. She attempted to fill machines with cash on no more than four occasions, but found it too difficult to do. Wife located one ATM location for the business. She denies ever repairing the business’s ATMs, claiming she did not know how to undertake repairs; she went with Husband while he repaired machines and would hold his tools. Wife did try to make suggestions to Husband about running the business, such as the method he used to write checks, but Husband did not listen to her.

At its height, the business had 45 machines, “from San Francisco to Santa Cruz to Livermore,” requiring travel of 1,000 to 1,200 miles each week to service and fill the machines. When machines broke down, or other problems arose, Husband had to respond to emergency calls, regardless of the time of day or night. ATMs would also get stolen. The business was cash intensive, which required obtaining cash from lines of credit and cash advances on credit cards. The costs associated with the business included the parts for physical maintenance, the monthly interest on the credit cards and lines of credit, the cost of gas, car maintenance, and insurance for travelling to the machines on a near daily basis, the installation and monthly fees for the ATM phone lines, and the “kickbacks” to the owners of the locations where ATM’s United installed the machines.

Husband's recordkeeping system for the business consisted of a basket above a computer in the parties' home, wherein he put receipts for business-related expenses. Husband did not prepare profit and loss statements, use QuickBooks, or do any "formal accounting" for the business. Husband did have a bookkeeper who prepared ATM's United's taxes.

The parties dispute the amount of income the business earned during the marriage. Wife alleges the business earned yearly gross income between \$124,174 and \$171,774 from 2010 and 2015; the gross income was \$169,285 in 2014, and fell to \$132,571 in 2015. Husband contends the business's yearly net income during that period was far lower, after taking into account the relevant expenses; at the highest the net income was \$85,357 in 2012, while at the lowest (for a full year) it was \$47,146 in 2015.

***B. ATM's United After Separation***

The parties separated on February 28, 2014, at which time it is undisputed Wife took community funds from the parties' bank accounts, in addition to some cash they kept at their home. After separation, Husband contends Wife "abandoned" him, leaving him to run the business by himself, "[a] daunting task that was not easy to do and in the end, contributed to the fatality of the company." Husband claims he had medical issues that made it difficult to operate the business by himself, including sustaining an injury while loading an ATM by himself, which required surgery in 2016. After that surgery, Husband hired the parties' adult son to assist him; he did not feel comfortable hiring additional, non-relative employees because of the large volume of cash needed to run the business. At trial, Husband testified the most physically demanding part of the job was installing and moving machines, which occurred infrequently.

Husband alleges the business was suffering even before Wife left, as several of ATM's United's customers were closing their businesses, buying their own ATMs, or switching to accepting credit cards, making the ATMs unnecessary. Husband contends ATM's United's income continued to decrease after separation. In addition to losing

customers, Husband alleges that a change in technology contributed to the decline in business; credit cards started using microchip technology, which required Husband to upgrade his ATMs or risk being held liable for “back charges” incurred in the event of fraudulent activity at the ATMs. In July 2014, Jason Downs, the person who processed ATM’s United’s payments, sent Husband his estimate regarding which of the company’s ATMs could be upgraded, and how much it would cost to upgrade those that could be. Many of the machines could not be upgraded; Husband alleges he could not afford to upgrade those that could be, especially since Wife removed money from the parties’ accounts. However, Husband also testified that the ATMs were not rendered useless if they were not upgraded, as they could continue to operate. He also confirmed that he had liability for back charges even before the microchip technology came into play.

After separation, Husband began preparing monthly profit and loss statements for the business, at the court’s request or suggestion. He provided handwritten statements for October 2014 through August 2015, alleging neither Wife nor her attorney asked for additional detail upon receiving the statements. In October 2014, Husband reported monthly net income of over \$7,000; by August 2015, net income dropped to just under \$3,000.

### ***C. Dissolution and Sale of Assets***

Wife filed for dissolution in February 2014. In October 2014, the parties stipulated to temporary spousal support orders based on Husband earning \$5,961 per month in self-employment income, in addition to his salary from the gas station. At a hearing in October 2015, the trial court modified spousal support, and set child support, based on Husband earning his gas station salary, \$4,008 per month in taxable self-employment income, and \$3,057 per month in nontaxable income. In doing so, the court found Husband had “not met his burden of proof to substantiate certain claimed business expenses for the business known as ATM’s United, including for a mileage deduction for his use of vehicles through the business . . . .” Prior to the October 2015 hearing,

Husband had claimed his monthly income was \$5,132 per month, although he believed he was going to lose two accounts that brought in \$4,593.95 per month.

Following the increase in Husband's support obligation, Wife alleges he intimated to her that he stopped making efforts to keep the business going in order to avoid paying her more support. Soon thereafter, Husband asked the court to further modify child and spousal support, alleging the business was "slowly failing," due to "medical difficulties" that required him to hire someone to do the work he normally did, and loss of accounts. Husband stated his expectation that the business would continue to decline as a result of the microchip technology and his inability to upgrade the ATMs.

In April 2016, the parties filed a stipulation and order (the April 2016 stipulation), which, relevant to this appeal, addressed the potential sale of ATM's United. "The ATM business known as ATM United [*sic*] shall be listed for sale with a broker and sold forthwith. In the event the broker finds the business not to be worth anything or not saleable, [Husband] will pay off all business debts, shut down the business and attempt to liquidate the assets. In the event any proceeds are received in excess of the business debts, those proceeds will be divided equally. It is expected debts will exceed the value of the business and its assets and any remaining debts will be paid from the proceeds from the sale of [other assets]." The parties agreed the broker used to sell the business would "communicate with [Wife] regarding offers, counter-offers, terms of listing, etc. and shall not enter into a purchase contract without [Wife's] written consent." If Husband himself sold the business, "he shall be under a fiduciary duty to supply all material information to [Wife] regarding any proposed sale. [Husband] shall not sell [the business] without [Wife's] written consent."

In May 2016, Husband notified Wife, through counsel, of his belief the business was not saleable, based on an evaluation of the business prepared by a broker; at trial, the court sustained Wife's objection to the evaluation coming into evidence. Husband further stated he had "started the process of dissolving the business," and would

“document what is done and will keep [Wife] informed as the shutdown progresses. It is expected that as of the date of trial, the business will no longer be operational.” Aside from consulting with the broker, Husband “asked around” to determine if any of his contacts in the ATM business would be interested in buying the business as a going concern, although at trial he did not know the names or phone numbers of the people he asked. Husband did not make any efforts to market the business, such as taking out any print or online advertisement; Husband did place an ad on Craigslist for the parts, although that was after he sold the ATMs, as discussed below. At trial, Husband testified he did not want to advertise the business because he “did not want to put a target on [his] back that [he carried] cash all the time.” Wife also tried to sell the business, listing it on Craigslist as an “ATM route for sale.” Wife received “about six” replies to the ad, but she did not notify Husband, having received the letter from him indicating he was in the process of dissolving the business; she believed Husband was going to do whatever he wanted to do.

Rather than selling the business as a going concern, Husband sold several of the ATMs owned by the business to two buyers: six to Cal Logic for \$750 total in June or July 2016; 16 to JD Consultants, Inc. for \$250 each (\$4,000 total) in August 2016; and another five to JD Consultants for \$1,500 each (\$7,500 total) in September or October 2016. JD Consultants, Inc., is run by Jason Downs, the person who two years earlier told Husband many of the machines were not able to be upgraded for the new chip technology. Husband did not make counteroffers to either Cal Logic or Downs. He did not receive offers from anyone other than Cal Logic and Downs, for either the business or its assets. Husband did not obtain Wife’s consent before selling the ATMs.

At the time Husband sold these ATMs, many of them were still generating revenue from surcharges for withdrawals. Notably, Husband introduced an exhibit indicating how many transactions were made at ATM’s United’s machines from January 2015 through October 2016, including how much each machine earned from surcharges.

As of July 2016, each of the 21 machines Husband sold to Downs continued to earn surcharges; for that month, those machines earned a total of \$7,477.14 in surcharges. This exhibit does suggest the total surcharges Downs earned following the transfer of the machines to him decreased. However, at trial Wife testified she visited many of the ATMs in 2016 and 2017, after the sale to Downs and Cal Logic, and found them still operational. Husband had not visited any of the machines after the sale, and did not know if the new owners upgraded or replaced the machines. Even after selling these ATMs to others, the owners of the businesses where the machines were located continued to contact Husband when problems arose.

After stipulating to a private judge to hear all issues in the matter, Wife filed a request for order seeking a separate trial on the issue of the date of valuation for ATM's United. Citing section 2552, subdivision (b), she asked the court to value the business as of February 28, 2014, arguing the revenue of the business, which Husband ran by himself, "plummeted" after the parties' separation. While Husband claimed changes in technology led to the decrease in revenue, Wife alleged Husband intimated he was not making efforts to keep the business going because he did not want to pay her support. Wife further alleged Husband failed to provide an accounting for the business, as required by a stipulation filed in October 2014, and claimed Husband breached his fiduciary duty by failing to obtain her consent before selling the business, as required by the April 2016 stipulation. In her accompanying memorandum of points and authorities, Wife argued good cause existed to select an alternate valuation date because the decrease in the business was due to the personal skill, industry, and guidance of Husband, he breached his fiduciary duty in the management of the business, he mismanaged the business, and/or his post-separation recordkeeping was so poor it rendered it difficult to determine the value of the business after separation.

Husband opposed Wife's request, claiming the business's profitability decreased once Wife left the business, as he could not manage it on his own. He also alleged the



move to microchip technology further impacted the value of the business, as many of the machines could not be upgraded, and Husband did not have the necessary funds to upgrade those that could. Husband believed the business had no value and could not be sold, such that he liquidated the assets instead.

The court held a bench trial in October 2017 on the valuation date issue, in which it heard testimony from Husband and Wife, discussed, *ante*, as well as from CPAs Marianne Kring and Lucy Chung. Kring, Wife's expert witness, testified about a spreadsheet she helped prepare summarizing bank statements showing funds moving in and out of three of ATM's United's bank accounts; Husband called Chung in rebuttal to this testimony. Kring testified that she prepared the spreadsheet to "understand the relationship of the inflows and outflows" in the accounts; she did not reach any conclusions based on the spreadsheet, and did not have any additional information about the case. To the extent Wife intended to use Kring's testimony to show money was missing from the bank accounts, Chung testified the aggregate total of the three accounts was a positive number. She contended Kring's spreadsheet was not meaningful without doing further analysis.

At the close of testimony and argument, the court issued an oral ruling granting the motion and setting the valuation date as February 28, 2014. It began by noting the "testimony regarding the compilation and the various bank accounts was of very little help to the Court in understanding the ongoing operations of the business." It then expressed "concern" about the court's finding in 2015 that Husband's income was more than he claimed at the time, and the evidence presented at the trial showing that the ATMs Husband sold to Downs were still generating revenue at the time of the sale. While the court "appreciate[d] the fact that technology was changing, that that was going to cause problems," it was not "clear to the Court [*sic*] that such a factor, or the other factors related to losing machines, rendered the entire business valueless[, w]hich would have had to occur in a relatively short period of time, based on what the Court [*sic*] saw

in the 2015 tax returns.” The court recognized that “[i]t’s . . . difficult, with a small business of any kind, for parties to maintain it going through a dissolution.” While the court agreed “that, to some extent, [Husband] got stuck holding the bag,” it did not find that fact to “obviate[] the problems that we see with valuation. The lack of attempt to try and get the machines upgraded over a period of two years, which is when the first notice was given from Jason Downs about the problems with upgrading the machines. The fact that there were no employees hired to help [Husband] with, presumably, what were difficult, time-consuming operations. It strikes the Court [*sic*] as being difficult to lead to a justification of using a later date of valuation.”

The trial court issued a written order granting Wife’s motion on October 26, 2017. It issued a certificate of probable cause for early appeal of the bifurcated ruling in November 2017. This court then granted Husband’s motion to appeal the decision on the bifurcated issue, which he filed within the time established by California Rules of Court, rule 5.392(d)(1).

## **II. DISCUSSION**

Husband alleges the trial court erred in several aspects in granting Wife’s motion for an alternate valuation date. First, he argues the trial court failed to consider the parties’ April 2016 stipulation, which he believes resolved the characterization and disposition of the business, in granting the motion. Second, to the extent the April 2016 stipulation did not preclude Wife’s motion, Husband argues the court applied the wrong burden of proof in ruling on Wife’s motion for an alternate date of valuation. Finally, he contends the court committed a “legal error” when it treated his “asset-based company like a personal services company for valuation purposes.”

### ***A. General Legal Principles***

Upon dissolution, the trial court must divide the community estate equally. (§ 2550.) Section 2552, subdivision (a) generally requires the trial court to value the community assets and liabilities “as near as practicable to the time of trial.” However,

under section 2552, subdivision (b), “Upon 30 days’ notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner.” “In this regard, the trial court has considerable discretion to divide community property in order to assure that an equitable settlement is reached. [Citation.]” (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1550 (*Nelson*).)

On appeal of an order setting a valuation date under section 2552, we apply the abuse of discretion standard, reversing only if, after considering all relevant circumstances, we find the trial court went beyond the bounds of reason, such that no reasonable judge would make the same order in the same circumstances. (*In re Marriage of Honer* (2015) 236 Cal.App.4th 687, 694 (*Honer*).) We presume the judgment is correct and will affirm it on any ground supported by the evidence, whether articulated by the trial court or not. (See *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336 (*Coral Construction*); *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.) We accept the court’s factual determinations as true so long as they are supported by substantial evidence; the valuation of a business is a factual issue. (*Honer*, at p. 694.) “In so doing, we ‘view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.’ [Citation.] If the record demonstrates substantial evidence in support of the judgment, we must affirm even if there is substantial contrary evidence. [Citation.]” (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 582.) If our decision turns on the interpretation or application of a statute, we review de novo that pure question of law. (*Honer*, at p. 694.)

### ***B. Husband Waived Arguments Not Raised in Trial Court***

Husband cites three bases for his argument that the trial court failed to consider the parties' April 2016 stipulation in ruling on Wife's motion for an alternate valuation date. First, he argues Wife's motion constituted an "improper collateral attack" on the stipulation. Next, he contends Wife implicitly waived her right to seek an alternate valuation date for the business by signing the April 2016 stipulation. Finally, Husband argues Wife was estopped from seeking an alternate valuation date, under the doctrines of equitable estoppel and/or judicial estoppel. Husband did not raise these arguments to the trial court.

Generally, parties cannot argue theories on appeal that they did not present in the trial court; this applies both to theories of liability and theories of defense. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 (*Nellie Gail*); *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695.) "Such new arguments may be deemed waived, based on common notions of fairness." (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519.) "An exception to the general rule may be presented, however, where the theory presented for the first time on appeal involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence. [Citation.] And whether the general rule shall be applied is largely a question of the appellate court's discretion. [Citation.]" (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167; accord *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511.) Here, the question of whether the April 2016 stipulation precluded Wife from seeking an alternate valuation date for the business is a legal question. However, it is not determinable from facts uncontroverted in the record; the parties did not address the circumstances surrounding the entry of the stipulation at the trial (i.e., whether they intended it to set the valuation date of the business), such that the presentation of additional evidence could alter a court's analysis of the legal issues.

In reply to the argument that he waived these issues on appeal, raised by Wife in her responsive brief, Husband contends he did raise these issues to the trial court, claiming on appeal he is simply citing the applicable legal authority. A party is not precluded from citing new legal authority on appeal for an issue that was in fact raised in the trial court. (*Porter v. Board of Retirement of Orange County Employees Retirement System* (2013) 222 Cal.App.4th 335, 347; *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.) However, a review of the record on appeal reveals Husband did not raise improper collateral attack, waiver, or estoppel as a basis for denying Wife's motion for an alternate valuation date.

In support of the contention that he did raise the subject issues in the trial court, Husband cites to three pages in the memorandum of points and authorities he filed to oppose Wife's motion, as well as a portion of his attorney's closing argument at trial. Nowhere in his responsive pleadings to the motion, or his attorney's closing argument, does Husband cite improper collateral attack, waiver, or estoppel as a basis for denying Wife's motion for an alternate valuation date. In the responsive memorandum of points and authorities, he states, "[Wife] agreed to a sale of the family business and attaches a copy of that agreement to her moving papers. She agreed to a division of any profits or losses upon sale. Now that it has turned out to be a loss, suddenly she wants an alternate valuation date." Husband cites to section 2552 and its requirement that the court find "good cause" to value the business at a date other than the time of trial, noting, "Is there good cause to move the valuation date back to the date of separation after the moving party had already agreed to a sale or liquidation of the business and did not get the money she expected? From a purely equitable standpoint the answer is no."

In arguing the existence of the April 2016 stipulation in his memorandum, Husband does so in the context of explaining why good cause does not exist to value the business at the date of separation: "Paragraph 14 of the court order provides for the sale of the business by listing it with a business broker. But, if the broker finds the business

not to be worth anything or not saleable, [Husband] was allowed to shut down the business and liquidate the business. [Wife] agreed to this, in writing, in a court order. Further, the business broker's letter was sent to [Wife's] counsel informing him of the lack of value of the business due to the lack of contracts with the establishments at which the ATM's were located and the obsolete nature of the equipment. [¶] Perhaps [Husband] did not keep [Wife] informed of how he was liquidating the business. That will be an issue for the court to determine at trial as to whether or not there was any damage to [Wife]. But other than that, all other factors clearly and absolutely show that nothing nefarious was happening.” In closing argument, Husband's attorney stated: “Valuation at the time of trial is the law. Alternate valuation is to remedy inequities. And there are no inequities. There are a lot of factors that caused this business to have a problems [sic], but nothing was done to intentionally try to deprive the petitioner of this business. In this case—this is an easy decision. It should be a very easy decision for the Court, because the parties agreed in a stipulation to liquidate it if it didn't have any value. If they were going to do an alternate valuation date, that would have been a meaningless stipulation. It would have never been entered in the first place. Why did they wait until a month before trial to bring it? Because somebody suddenly thought up this idea of here's a way of getting more money. So it doesn't make sense. The position is inconsistent. And [Husband is] the one that if it is granted, he's the one that's going to have the inequity and suffer the inequity, because he tried and he did the best he could, and it just went downhill.”

Husband's reference to inconsistencies or inequities is not sufficient to now find that he raised improper collateral attack, waiver, or estoppel before the trial court. In *Nellie Gail*, for example, defendants argued the trial court erred in ruling for plaintiff because two of their defenses, including equitable estoppel, defeated the plaintiff's claims as a matter of law. (*Nellie Gail, supra*, 4 Cal.App.5th at p. 997.) While the defendants included the two boilerplate defenses in their answer to the complaint, and identified the

defenses as two of their 19 controverted issues for trial, they did not argue the defenses in their trial brief, or raise the defenses during opening or closing statements. (*Id.* at pp. 997-998.) On appeal, the defendants cited to one page of the reporter's transcript, wherein defense counsel mentioned " 'equitable estoppel' during closing argument." (*Id.* at p. 998.) "This isolated utterance, however, is not sufficient to preserve the issue for appeal because the [defendants'] counsel did not utter those words while arguing [the plaintiff] was equitably estopped to assert a quiet title claim." (*Ibid.*) Here, Husband never argued, in either his pleadings or at the hearing, that improper collateral attack, waiver, or estoppel precluded the trial court from granting Wife's request for an alternate valuation date. Rather, he argued that good cause did not exist to do so, pursuant to section 2552.

Notably, none of the legal authority Husband cited in his memorandum of points and authorities filed with the trial court invoke the arguments he now wishes to make on appeal. He addressed section 2552 and case law discussing its application, as well as the application of its nearly identical predecessor, former Civil Code section 4800; none of the cases address improper collateral attack, waiver, or estoppel. (*In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1278-1279 (*Margulis*) [trial court can shift burden of proof on the disposition of missing assets to the managing spouse, using "an alternate valuation date where fairness requires."]; *Nelson, supra*, 139 Cal.App.4th at pp. 1550-1552 [managing spouse's poor recordkeeping can support finding of good cause for alternate valuation date, even if there is no evidence of intentional concealment]; *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 626-627, 629 [trial court properly used alternate valuation date where value of business largely depended on skill, industry, guidance, and reputation of managing spouse, rather than the underlying capital]; *In re Marriage of Rueling* (1994) 23 Cal.App.4th 1428, 1435 [trial court correctly denied alternate valuation date where doing so would have resulted in an unequal division of community assets]; *In re Marriage of Priddis* (1982)

132 Cal.App.3d 349, 358, superseded by statute on another ground as stated in *In re Marriage of Buford* (1984) 155 Cal.App.3d 74, 79-80, fn. 3 [“... the mere passage of time alone between the dates of separation and trial is an insufficient basis for setting the valuation date at a time other than ‘as near as practicable to the time of trial.’ ”]; *In re Marriage of Stallcup* (1979) 97 Cal.App.3d 294, 301 (*Stallcup*) [managing spouse’s failure to provide relevant materials, and the inconsistencies present in the evidence reviewed by the trial court, supported finding of good cause to set alternate valuation date]; *In re Marriage of Barnert* (1978) 85 Cal.App.3d 413, 424 [“...the valuation of an income producing asset which is under the control of a spouse, such as a medical or legal practice, is governed by [former] Civil Code Section 5118 which makes any portion of the practice assets attributable to the earnings and accumulations of a spouse while living separate and apart the separate property of that spouse, subject to the application in reverse of the *Van Camp-Pereira* rules.”].)

Based on our careful review of the record and the law, we conclude Husband waived the issues of improper collateral attack, waiver, and estoppel on appeal.

***C. The Trial Court Applied the Proper Burden of Proof***

Husband next argues the trial court improperly shifted the burden of proof in applying section 2552, claiming it required Husband to show good cause to have the business valued at the time of trial, rather than requiring Wife to prove good cause for an earlier valuation date. There is no dispute Wife had the burden of proof on her motion. (§ 2552, subd. (b).) Although the trial court, at the end of the trial, stated that the evidence before it made it, “difficult to lead to a justification of using a later valuation date,” earlier in the hearing, the court made it clear it understood Wife had the burden of proof: “So it’s the obligation of the moving party—[Wife] to show the Court by a preponderance of the evidence that the Court should find that the party in possession of the business—in this case, [Husband] has in some way, shape or form caused the business to decline in value such that the Court should use an alternate valuation date.



I'm not referring to any increase in value, which also could be a basis for doing this. But it's clearly not the case here.” Based on this statement, we do not agree the trial court applied the wrong burden of proof in this case; the court, at minimum, required that Wife prove an alternate valuation date to be appropriate under the circumstances. The court did misstate Wife's burden in that regard—she did not have to prove that Husband caused the value of the business to decline after separation, but rather that good cause existed to use an alternate valuation date. Even if the trial court articulates the wrong reasons when arriving at a correct conclusion, we will presume the judgment correct and affirm it on any ground supported by the evidence, whether articulated by the trial court or not. (See *Coral Construction, supra*, 50 Cal.4th at p. 336.) The record clearly shows the court held Wife to the burden of proof, not Husband.

Even if the court did hold the parties to the wrong burden of proof, Wife correctly states the standard of review we apply to such an error. “Misallocation of the burden of proof in a bench trial is not reversible error per se but must be prejudicial to warrant reversal. [Citation.] Prejudice means ‘ “a reasonable probability that in the absence of the error, a result more favorable to [the appellant] would have been reached.” ’ [Citation.] . . . [¶] . . . If substantial evidence supported the implied finding [made by the trial court], then the trial court's misallocation of the burden of proof would be harmless because there would be no reasonable probability the court's decision would have been different in absence of the error.” (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1287-1288.) As discussed in section II(D), *post*, we are persuaded substantial evidence supports an implied finding that good cause exists to value the business at the date of separation, rather than the date of trial.

## ***D. The Trial Court Did Not Abuse Its Discretion in Granting the Motion***

### ***1. Doctrine of Implied Findings***

The trial court held a bifurcated trial to determine the valuation date of ATM's United.<sup>4</sup> Such a trial invokes the right of a party to obtain a statement of decision upon request. (See Cal. Rules of Court, rule 3.1591(a); *Earp v. Earp* (1991) 231 Cal.App.3d 1008, 1012.) Under Code of Civil Procedure section 632, a party can request a statement of decision following the "trial of a question of fact by the court," in which the court must explain "the factual and legal basis for its decision as to each of the principal controverted issues at trial . . . ." The trial court does not have to provide such a statement absent a request from a party. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970 (*Acquire II*.)

"A party's failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.] This doctrine 'is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.' [Citation.]" (*Acquire II, supra*, 213 Cal.App.4th at p. 970; accord *Nellie Gail, supra*, 4 Cal.App.5th at pp. 995-996.)

In the instant matter, there is no dispute the parties did not request, and the court did not prepare, a statement of decision following the trial. Wife therefore argues this

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<sup>4</sup> Although brought as a "request for order," the equivalent of a motion in a family law proceeding (see Cal. Rules of Court, rule 5.92(a)(1)(A)), Wife clearly asked for a "separate trial" on the issue. While Husband opposed the court using an alternate date to value ATM's United, he seemingly agreed the court could hold a separate trial to determine whether an alternate date was appropriate.

court “should disregard [Husband’s] complaints about the trial Court’s [*sic*] findings” and “presume that the trial Court [*sic*] made the necessary findings to support its decisions”; Wife asks this court to affirm the ruling “as long as it finds that substantial evidence supported the trial Court’s [*sic*] decision, on any theory . . . .”

Citing *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538 (*Border Business Park*), Husband contends the implied findings doctrine does not apply, as “the record reflects what the court actually did . . . . (*Id.* at 1550.)” He argues, “In that instance, the appellate court will not presume it did something different,” citing *Lafayette Morehouse Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 (*Lafayette*). He believes, “even in the absence of a statement of decision, if the record adequately demonstrates the legal theory the trial court applied, the appellate court is not compelled to resort to a presumption. (*Border Business Park, supra*, at p. 1550.)” Husband is correct that, when the record *clearly* shows what the trial court did, the appellate court will not presume it did something different. (*Border Business Park*, at p. 1550, italics added; *Lafayette*, at p. 1384.) “[W]e are not compelled to resort to a presumption if the record *adequately* demonstrates the legal theory the court applied.” (*Border Business Park*, at p. 1150, italics added.) In *Border Business Park*, the reporter’s transcript revealed the trial court made specific findings as to the legal theories it relied on, and then instructed the jury based only on those theories. “The court’s statements plus the jury instructions foreclose any possibility that the court’s finding of liability for inverse condemnation was based on any other legal theory. Moreover, the jury’s verdict awarding damages on the airport cause of action was unquestionably based solely on the [specified legal theory]; it was not instructed on any other theory. We cannot uphold the damage award on an alternative theory which was not submitted to the jury. [Citation.]” (*Id.* at p. 1551.)

By comparison, here, the trial court did not clearly set forth the legal theory it relied on to grant Wife’s motion for an alternate valuation date. As discussed *ante*, the

court indicated during the hearing that Wife had the burden of proving the appropriateness of an alternate valuation date. However, it misstated Wife's burden, saying she had to prove Husband caused a decline in value, rather than that she had to show good cause to use an alternate date. Moreover, as Husband points out, the court also suggested it did not find "justification" for "using a later [valuation] date . . . ." All of this created confusion as to which legal theory the court applied in its ruling. The court expressed "concerns" about the prior findings that Husband earned \$4,000 per month in self-employment income, and the evidence presented at trial showing that many of the ATMs Husband sold were still generating income at the time of transfer. The court "appreciate[d] the fact that technology was changing," but stated "it's not clear to the Court that such a factor, or the other factors related to losing machines, rendered the entire business valueless." The court noted that it is difficult to maintain a small business while going through a dissolution, and said it agreed that "to some extent, [Husband] got stuck holding the bag." Yet, the court also noted the "lack of attempt to try and get the machines upgraded over a period of two years," and the "fact that there were no employees hired to help [Husband] with, presumably, what were difficult, time-consuming operations," in finding it "difficult to lead to a justification of using a later date of valuation." The court never explicitly said it found good cause to use an earlier date of valuation, or explained specifically why it believed good cause existed to do so. We therefore find the record sufficiently unclear to justify the doctrine of implied findings. We will presume the trial court made all necessary findings supported by substantial evidence.

***2. Substantial Evidence Supports the Implied Findings Necessary to Establish Good Cause for an Alternate Valuation Date***

Husband argues the trial court erred in granting the request to value the business at the date of separation because the business was an asset-based business rather than one that relied on Husband's skill and reputation. Section 2552 does not require the trial

court to find that the increase or decrease in the value of an asset was the result of the managing spouse's personal skill in order to value it at an alternate date; the court need only find "good cause" for doing so. (§ 2552, subd. (b).) Certainly, "an alternative valuation date may apply to a business when its value 'devolves largely from the personal skill, industry and guidance of the operating spouse,' rather than the business's capital assets. [Citations.] Conversely, a trial date valuation may be appropriate where the postseparation efforts of the operating spouse have 'minimal impact' on any increase in the value of the business. [Citation.]" (*In re Marriage of Duncan, supra*, 90 Cal.App.4th at p. 626.) However, the statute does not limit the court's discretion to choose an alternate valuation date solely to these circumstances.

In *Nelson*, this court upheld the trial court's order setting the date of separation as the valuation date for a retail business the wife started during the marriage; in making the order, the trial court found "(1) the state of [the wife's] 'record keeping and subsequent disclosures were such that it was difficult if not impossible to calculate the value of this business since the date of separation,' and (2) the business 'was a sole proprietorship operated by [the wife] alone from the date of separation.' " (*Nelson, supra*, 139 Cal.App.4th at pp. 1550-1551.) This court affirmed the order based solely on the state of the wife's record keeping, without considering whether the evidence supported a finding that the business's value came from the wife's personal skill, etc. (*Id.* at p. 1552.) Based on our reading of *Stallcup, supra*, 97 Cal.App.3d at page 301, we concluded, "a party may not benefit from confusion for which he or she is responsible. (Civ. Code, § 3517 ['No one can take advantage of his own wrong'].) Stated another way, when a party precludes an expert's trial-date valuation because he or she does not provide needed information, a valuation as of another time is appropriate because it is made 'as near as practicable to the time of trial.' (§ 2552, subd. (a).)" (*Nelson*, at p. 1551.) In *Stallcup*, the trial court determined the managing spouse "willfully refused discovery and

disobeyed court orders” regarding the production of information.<sup>5</sup> (*Id.* at p. 1551, citing *Stallcup*, at p. 301.) While we noted the *Stallcup* ruling “inferred that the husband was intentionally concealing information,” we also noted “the appellate holding does not rest upon intentional concealment.” (*Nelson*, at p. 1551.) Notably, nothing in the *Nelson* opinion suggests the wife failed to comply with discovery requests or otherwise failed to provide requested information to the husband. We simply found the wife engaged in “poor recordkeeping,” which precluded the husband’s experts from “adequately” valuing the business post-separation. (*Id.* at p. 1550.)

The trial court can also effectively use an alternate date of valuation when a managing spouse is unable to account for missing assets. In *Margulis*, the husband managed the parties’ assets during marriage; upon dissolution, he claimed the assets had been dissipated as a result of stock market losses and community expenditures. (*Margulis*, *supra*, 198 Cal.App.4th at pp. 1258, 1260.) However, he presented limited documentary evidence of the value of the assets post-separation. (*Id.* at pp. 1258, 1261.) The wife had information about the value of the assets eight to nine years prior to the trial; she argued that the burden should shift to the husband, as the managing spouse, to disprove those values, as he “was the only one with personal knowledge or records to prove the value and disposition of the community funds postseparation.” (*Id.* at p. 1262.)

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<sup>5</sup> In *Stallcup*, the parties purchased several Taco Bell restaurants during the marriage. (*Stallcup*, *supra*, 97 Cal.App.3d at p. 298.) The husband responded to written discovery requests only after the trial court granted a motion to compel. (*Ibid.*) He also failed to cooperate with a court-appointed accountant, resulting in the trial court precluding him from introducing evidence of certain transactions at trial. (*Id.* at pp. 298-299.) The Court of Appeal upheld an alternate valuation date based on the husband’s failure to deliver relevant materials, noting the trial court found inconsistencies in his testimony and other evidence, causing the court to conclude he was not a credible witness. (*Id.* at p. 301.) While the parties agreed the husband was the primary decision-maker with regard to the business, and possessed the relevant records (*id.* at p. 298, fn. 1), nothing in the opinion indicates a finding that the business’s value devolved from the husband’s personal skill, industry and guidance.

The trial court did not rely on the wife's evidence and did not charge the husband with any of the allegedly missing funds, impliedly accepting his assertion that he spent the money on community expenses and lost the remainder in the stock market. (*Id.* at pp. 1262-1263.)

On the wife's appeal, the Court of Appeal found the trial court erred when it excluded the postseparation assets the husband controlled from the community property chargeable to him. (*Margulis, supra*, 198 Cal.App.4th at pp. 1265-1266.) "...[T]he trial court concluded that [the wife], the nonmanaging spouse who lacked both personal knowledge and records concerning the assets . . . , failed to meet the difficult burden of proving these now missing assets had existed . . . . [¶] The trial court's failure to place the burden of proof on [the husband] relieved him of the duty to account for his postseparation management of these assets. Thus, [he] did not have to prove the *amounts* that had been in these accounts or that he had properly disposed of those sums. This lack of accountability poses a risk of abuse and runs afoul of the statutory scheme imposing broad fiduciary duties of disclosure and accounting on a managing spouse. [¶] . . . We conclude that once a nonmanaging spouse makes a prima facie showing concerning the existence and value of community assets in the control of the other spouse postseparation, the burden of proof shifts to the managing spouse to rebut the showing or prove the proper disposition or lesser value of these assets. If the managing spouse fails to meet this burden, the court should charge the managing spouse with the assets according to the prima facie showing." (*Id.* at pp. 1266-1267.)

Here, there is substantial evidence to support an implied finding by the trial court that the value of ATM's United devolved from Husband's personal skill, industry and guidance rather than the ATMs. Presumably the court credited Wife's testimony about her involvement with the business over Husband's, such that it believed Husband operated the business almost exclusively by himself during the marriage. Given that Husband did not have contracts with the business owners to maintain ATMs on their

premises, we can imply the trial court found Husband had to use his personal skill, industry and guidance to ensure positive relationships with the owners to keep the ATMs in place. At least one business owner contacted Husband even after he sold the ATM because the business owner was unhappy with the new ATM owner; he wanted the ATM removed due to his unhappiness.

Alternatively, the evidence supports a finding that Husband's poor recordkeeping, or duty to account for his postseparation management of the business, evidenced good cause to value the business as of the date of separation, rather than the date of trial.<sup>6</sup> Husband's admitted method of bookkeeping was putting receipts for the business into a basket above a home computer. While Husband claimed the business was effectively valueless, the evidence showed most if not all of the ATMs Husband sold were still earning surcharges at the time of the sale. There exists substantial evidence to support a finding that Wife made a prima facie showing of the existence and value of assets in Husband's control, thus shifting the burden to Husband to "rebut the showing or prove the proper disposition or lesser value of these assets." (*Margulis, supra*, 198 Cal.App.4th at pp. 1266-1267.) Aside from his own testimony, Husband did not introduce admissible evidence supporting his claim that the business could not be sold as a going concern. The trial court's stated findings suggest the court questioned Husband's credibility, particularly the court's reference to its "concern" over the December 2015 finding regarding Husband's self-employment income, and its concern that the ATMs continued to generate revenue at the time of the sale.

There is substantial evidence to support the court's concerns. The 21 ATMs Husband sold to Downs generated almost \$7,500 in surcharges in the last month they

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<sup>6</sup> Wife urges us to consider Husband's alleged breaches of fiduciary duty in evaluating whether substantial evidence supports the trial court's ruling. The trial court explicitly refrained from making a finding with respect to breach of fiduciary duty. We will not now infer such a finding.



were owned by ATM's United, yet Husband sold the machines for only \$12,500, to the person who two years prior asserted most of the machines had minimal value or could not be upgraded. Aside from his handwritten profit and loss statements, Husband did not provide any additional evidence proving his claimed expenses. Nor did he provide evidence regarding the alleged increase in liability he would suffer if he did not upgrade the ATMs for the new microchip technology; ultimately, his testimony suggested he had similar exposure prior to the adoption of the new technology. Neither *Nelson* nor *Margulis* required the trial court to find Husband breached his fiduciary duties in order to determine that an alternate date of valuation was appropriate based either on his poor recordkeeping, or his failure to meet the shifted burden of proof regarding his post-separation management of the business. (See *Nelson, supra*, 139 Cal.App.4th at p. 1551; *Margulis, supra*, 198 Cal.App.4th at pp. 1271-1274 [while the statutory duties of disclosure and accounting justify shifting the burden of proof to the managing spouse, the appellate court did not require a finding of breach before shifting the duty].)

As substantial evidence supports the implied finding that good cause existed to value ATM's United as of the date of separation, rather than the date of trial, the trial court did not abuse its discretion in granting Wife's motion.

### **III. DISPOSITION**

The October 26, 2017 order is affirmed.

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Greenwood, P.J.

WE CONCUR:

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Bamattre-Manoukian, J.

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Danner, J.

Naderzad v. Naderzad  
No. H045298